SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1974

No. 74-531

THOMAS F. PATTON and RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR,

Petitioners,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND CONGRESS OF RAILWAY UNIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit

Petitioners, Thomas F. Patton and Ralph S. Tyler, Jr., Trustees of the Erie Lackawanna Railway Company, Debtor, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 5, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 500 F.2d 34 (6th Cir. 1974) and appears in the Appendix, page A1. Order No. 101 with Memorandum and Opinion of the District Court for the Northern District of Ohio, not reported, appears in the Appendix, page A10. The Supplemental Report of the Interstate Commerce Commission (ICC) in the related case, not yet reported, appears in the Appendix, page A18.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1974 (App. p. A5). A timely Petition for Rehearing was denied on August 8, 1974 (App. p. A7). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

This case concerns the right of the District Court sitting as the Reorganization Court to conserve assets of the Debtor's estate pending final determination of issues before the ICC. The Trustees filed a petition with the ICC seeking *suspension* during the reorganization of employee protection agreements imposed on the Debtor in an inclusion proceeding.[2] Thereafter the Reorganization Court ordered *impoundment* of the payments accruing under

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[1] The Appendix, separately printed, is hereinafter referred to as "App. p. ( )". The Petitioners are referred to as the "Trustees" and the Respondents as the "Unions".

[2] Now on review to a three-judge court by virtue of a complaint filed by the Trustees in the United States District Court for the Northern District of Ohio, Eastern Division, on September 17, 1974 pursuant to 28 U.S.C. §§ 1336, 1398 and 2321-2325. The ICC denied the Trustees' petition for suspension by Order dated April 29, 1974 pursuant to the Supplemental Report mentioned above (App. p. A18).

such agreements until further order of court. The propriety of the interim action of the Reorganization Court is the subject of this litigation.

The questions presented are:

1. Did not the Reorganization Court have the supervisory power to protect the Debtor's assets by impounding the protection payments pending definitive determination of the right thereto in the appropriate forum?

2. Is not Section 77(n) of the Bankruptcy Act inapplicable to payments to employees governed by protection agreements imposed by the ICC under Section 5(2)(f) of the Interstate Commerce Act as a condition to its approval of a railroad inclusion?

3. Should not the Court of Appeals have remanded the case with directions to the Reorganization Court to take testimony on the question of irreparable harm, rather than resolve that question conclusively against the Trustees by vacating the orders below?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 11, §§205(a) and 205(n):
United States Code, Title 45, §156;
United States Code, Title 49, §§5(2)(f) and 5(11).

These are set out in the Appendix at pages A32, A33, A34, A34, and A35, respectively.

STATEMENT OF THE CASE

By order of June 9, 1967, the ICC approved the inclusion of Erie-Lackawanna Railroad Company in the system of Norfolk and Western Railway Company (N&W). The modus was merging Erie-Lackawanna Railroad Company into the Debtor, Erie Lackawanna Railway Company, a wholly-owned subsidiary of Dereco, Inc., itself a subsidiary of N&W. This Court approved the inclusion,[3] which was accomplished on April 1, 1968.

Anticipating consolidations of various facilities and work forces of the Debtor with those of the N&W as a result of the inclusion, the ICC imposed protection agreements upon the Debtor pursuant to Section 5(2)(f) of the Interstate Commerce Act.[4] These agreements provide that the Debtor's employees are not to be deprived of employment or placed in a worse position with respect to compensation as a result of the inclusion. Any employee of the Debtor on April 1, 1968 who was adversely affected by any such consolidation of facilities or work forces became entitled to "protection payments" equal to the difference between his future monthly earnings and the compensation he had been earning during a designated "base" period (App. p. A19).

On June 26, 1972 the Debtor filed a Petition for Reorganization under Section 77 of the Bankruptcy Act, which was approved by The Honorable Robert B. Krupansky, United States District Court for the Northern

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[3] *Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486, 525-26 (1968).

[4] *Norfolk & Western Ry. & New York, Chicago & St. Louis R.R., Merger, etc.*, Finance Docket No. 21510, 330 I.C.C. 780, 822-26 (1967). The protection agreements imposed on the Debtor in the inclusion proceedings incorporated by reference the terms of the protection agreement approved by the ICC at the time of the N&W-Nickel Plate consolidation in 1964. 389 U.S. 486, 526 (1968); (App. p. A19).

District of Ohio. The Trustees were thereafter appointed and duly qualified. Jurisdiction below was based upon Sections 11 and 205, Title 11 of the United States Code.

The Trustees discovered that only minor consolidations of facilities or work forces with N&W had been made since the April 1, 1968 inclusion. Yet there was an annual drain on Debtor's resources in excess of $1,000,000 because of protection payments to approximately one-sixth of its employees who were not in any way adversely affected because of the inclusion. Furthermore, with control of the Debtor no longer in N&W but in the Trustees, subject to direction of the Reorganization Court, consolidations of facilities or work forces with the N&W pursuant to the inclusion order were not possible. Accordingly, on March 20, 1973 the Trustees filed their petition with the ICC to reopen the prior inclusion proceedings for the purpose of suspending operation of the protection agreements during the course of the reorganization.

Immediately after commencing the proceedings to suspend before the ICC, the Trustees filed their petition in this case with the Reorganization Court. The Trustees requested authorization to impound the "protection payments" by depositing them monthly in an interest-bearing account pending final resolution of the issues before the ICC. On March 21, 1973 the Reorganization Court entered Order No. 71 granting the Trustees' petition, directing them to give notice to intervenors and other interested parties, and stating that the order would become final unless a motion to vacate or other pleading was filed by April 2, 1973 (App. p. A8).

After a hearing upon motions filed by the Unions, the Reorganization Court entered its Memorandum, Opinion and Order No. 101 on May 17, 1973 denying the Unions' motions to vacate Order No. 71. The Reorganization Court stated:

"Order No. 71 was designed to protect the interests of both the employees and the Trustees by preserving the subject matter in dispute until the Interstate Commerce Commission resolves the issues presented by the Petition of the Trustees, thereby assuring the integrity of the accrued funds, including interest thereon, and allaying even the threat of irreparable harm to either side.

Order No. 71 has preserved the status quo by preventing either party from dissipating the assets pending a final determination of the issues before the Commission. Also, Order No. 71 eliminates the necessity of further costly litigation by the prevailing party to receive the fruits of its successful efforts." (App. p. A16).

As of August 1, 1974, $1,157,593 has been impounded pursuant to Order No. 71. In no case have the impounded payments for a given employee constituted all the payments due him or her for a given month. Each employee covered by the protection agreements continues to receive wages based upon his employment with the Debtor. The amounts which have been impounded constitute only the supplement, if any, between an employee's monthly earnings and his base period compensation.[5]

On July 5, 1974, the Court of Appeals for the Sixth Circuit *reversed* the Reorganization Court and *vacated* Orders Nos. 71 and 101 for two reasons: (1) that the protection payments were impounded in violation of the provisions of Section 77(n) of the Bankruptcy Act; and (2) that the Reorganization Court failed to take evidence in order to make findings of fact on irreparable injury (App. p. A1). The Trustees' timely petition for rehearing was denied on August 8, 1974 (App. p. A7).

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[5] Affidavit of Ralph S. Tyler, Jr. filed in support of Motion to Stay Issuance of Mandate in the Sixth Circuit, August 12, 1974.

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit Denied A Railroad Reorganization Court The Supervisory Power To Protect A Debtor's Estate During Reorganization.

The two leading cases of this Court on the supervisory powers of a railroad reorganization court are *Order of Conductors v. Pitney*, 326 U.S. 561 (1946), and *Thompson, Trustee, v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). In *Pitney*, this Court approved supplanting one set of conductors with members of another union pending determination of the contractual rights of the contending unions. In *Magnolia*, this Court approved the extraction and sale of oil and impoundment of the proceeds pending determination of legal title thereto. In the present case, the Reorganization Court impounded payments pending determination of the suspension of the agreements under which the payments were being made.

The applicability of *Pitney* and *Magnolia* proceeds from Section 77 of the Bankruptcy Act. 11 U.S.C. § 205 (1970). Section 77(a) provides that a reorganization court shall have exclusive jurisdiction over the debtor and its property during reorganization. This exclusive jurisdiction permits a reorganization court to utilize not only all powers flowing from Section 77, but all powers not inconsistent with Section 77 "which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose" (App. p. A32). See *Continental Bank v. Rock Island Ry.*, 294 U.S. 648 (1935); *Ex parte Baldwin*, 291 U.S. 610 (1934).

In exercising such exclusive jurisdiction, railroad reorganization courts have the responsibility to conserve the debtor's estate for the benefit of creditors and to preserve an ongoing railroad in the public interest. *New Haven In-*

clusion Cases, 399 U.S. 392 (1970). In that case this Court noted:

> "After 35 years of § 77, as amended, it is unnecessary to recanvass the two basic objectives of the statute—the conservation of the debtor's assets for the benefit of creditors and the preservation of an ongoing railroad in the public interest." *Id.* at 431.

In *Order of Conductors v. Pitney*, 326 U.S. 561 (1946), this Court held that a reorganization court has the duty under its supervisory powers to direct its trustees in the conservation of the debtor's assets and the proper administration of the estate. The trustees of the Central Railroad Company of New Jersey, in a Section 77 reorganization, obtained approval of the reorganization court to displace the yard conductors of one union for those of another. The union representing the displaced employees petitioned the reorganization court to enjoin the trustees from such action, contending that a change in working conditions had been made without compliance with the appropriate provisions of the Railway Labor Act in violation of Section 77(n). The reorganization court dismissed the petition. The Third Circuit affirmed. This Court granted certiorari.

In its *Pitney* opinion, this Court first noted that a reorganization court, acting in the capacity of a judicial body in the possession of the debtor's business, has the power and duty to exercise the jurisdiction conferred by the Bankruptcy Act "to control its trustees so as to insure the preservation and proper administration of the debtor's estate." *Id.* at 565. This Court then held that the reorganization court had properly directed its trustees with respect to the substitution of employees, but that it could not *finally* settle the issues between the unions and the trustees because that was the function of the Adjustment Board under the procedures of the Railway Labor Act. Nonetheless,

pending such final determination, the reorganization court had the power to approve the interim arrangements made by its trustees respecting the substitution of employees. Accordingly, the union's petition should have been stayed pending determination of the issues before the Adjustment Board rather than dismissed on the merits. *Id.* at 567-68.

In the present case, the Reorganization Court followed the holding of *Pitney* in all respects. It recognized that final determination of the issues raised before the ICC was the only method of resolving whether the protection agreements should be suspended (App. p. A15). But pending such final determination of those issues, the Reorganization Court properly directed impoundment as a necessary utilization of its supervisory powers over the Debtor's estate to avoid the serious impairment to it that could accrue during the interim period.

The exercise of the supervisory powers of a reorganization court to impound funds pending decision on the merits in another forum was approved by this Court in *Thompson, Trustee, v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). The trustee of a debtor railroad there claimed fee title in a right-of-way over oil-rich land. This claim of fee ownership, and the consequent right to drill for the fugitive oil, was disputed under state law.

In order to prevent irreparable loss to the debtor's estate, the reorganization court authorized the trustee to extract and sell the oil and to impound the proceeds for the rightful owner as determined by the state court. This Court upheld such interim action.

> "We are of opinion that it was not an abuse of discretion for the bankruptcy court to authorize the trustee to protect all interests—so far as it appeared possible to do so—by preserving the oil, from waste and depletion, through its extraction and sale with the net proceeds to be impounded until final determina-

> tion of the controversy over title to the right of way lands.
>
> The verified petition and supporting evidence offered a basis for the District Court's finding that such steps were necessary to protect the estate's possible interest in the oil under the right of way. No other method has been suggested whereby such protection against irreparable loss to the estate of the wandering and vagrant oil could have been better afforded." *Id.* at 482-83.

Pitney and *Thompson* clearly establish that it was a proper exercise of the equitable and supervisory powers of the Reorganization Court to enter Orders Nos. 71 and 101 directing interim impoundment of the protection payments. The supervisory powers exercised in *Pitney* were sustained even though wages and working conditions of employees were involved. The supervisory powers exercised in *Thompson* to prevent irretrievable loss of the oil were equally necessary and proper here to prevent irrevocable loss of assets in the Debtor's estate.

The Sixth Circuit's reversal and vacation of the impoundment orders is in conflict with the principles enunciated in *Pitney* and *Thompson*. In addition, the decision of the Sixth Circuit seriously undermines the supervisory powers of the Reorganization Court by truncating the broad authority it should enjoy to direct the conduct of its Trustees. Without the power in the Reorganization Court to insure the preservation and proper administration of the Debtor's estate, the prospect of successful reorganization of a vital link in railroad transportation is seriously impeded.

2. Contrary To The Principle Of This Court's Nemitz Decision, The Sixth Circuit Held Section 77(n) Of The Bankruptcy Act Applicable To Protection Agreements Imposed By The Interstate Commerce Commission.

In *Norfolk & Western R. R. v. Nemitz,* 404 U.S. 37 (1971), this Court affirmed the Sixth Circuit's determination that Section 77(n) can have no application to protection agreements imposed by the ICC as a condition to approval of a consolidation under Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f)(1970).

This Court held in *Nemitz* that a protection agreement entered into by N&W and The Brotherhood of Railroad Trainmen pursuant to the N&W-Nickel Plate consolidation, and later approved by the ICC as part of the consolidation proceedings, could not thereafter be substantially abrogated by the parties. The underlying rationale was that such agreement, once approved by the ICC, became a "condition" of the ICC's approval of the consolidation and, therefore, could not be modified subsequently even though both the railroad and union consented. *Id.* at 43.

The Sixth Circuit had reached a similar conclusion in *Nemitz* and ruled that the affected employees were entitled to the protection set forth in the ICC-approved agreement notwithstanding their own union's subsequent agreement with the railroad to modify such protection. The Sixth Circuit held that under Section 5(11) of the Interstate Commerce Act, 49 U.S.C. §5(11) (1970), the ICC is seized with exclusive jurisdiction in all matters pertaining to labor protection agreements imposed by ICC order pursuant to its approval of a merger, consolidation or inclusion of rail carriers. It further held that the Railway Labor Act, 45 U.S.C. §§151 *et seq.* (1970), does not apply to disputes arising under labor protection agreements within the ICC's exclusive and plenary jurisdiction. In so holding, the Sixth Circuit reasoned as follows:

> "Section 5(11) of 49 U.S.C. provides in part, that 'the authority conferred by this section shall be *exclusive and plenary.*' . . . The cumulative effect of the decisions is that there must be exclusive and plenary authority in the I.C.C. to achieve the purposes of the Act. The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, *the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied.*" *Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir. 1971). (Emphasis added in part.)

Accord, Brotherhood of Locomotive Eng'rs v. Chicago & North Western Ry., 314 F.2d 424 (8th Cir. 1963).

Yet in spite of the clear view which the Sixth Circuit had of the exclusive jurisdiction of the ICC in *Nemitz*, in this case the appellate court held that the "prescribed procedure" of Section 77(n) should have been followed (App. p. A3).[6] This is so sharp a departure from and so contrary to the principle of its decision in *Nemitz*, as affirmed by this Court, as to be antipodal.

The purpose of Section 77(n) is to give effect to the Railway Labor Act. If the Railway Labor Act does not apply, Section 77(n) can have no application. This is apparent from its text which reads as follows so far as pertinent:

> "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees

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[6] A logical explanation for the changed position of the Sixth Circuit may be found in its erroneous assertion that the order of the Reorganization Court "provided for the suspension of the . . . protection agreements." (App. p. A1). In fact, the order only impounded the payments thereunder.

> *except in the manner prescribed in section 151 to 163 of Title 45, as amended June 21, 1934 [Railway Labor Act]*, or as they may be hereafter amended." 11 U.S.C. §205(n) (1970). (Emphasis added.)

Section 77(n) preserves the procedure of the Railway Labor Act and prevents judges and trustees in control of debtor railroads from disaffirming labor contracts not subject to the sole jurisdiction of the ICC. Section 77(n) cannot apply to ICC-approved labor agreements.

The validity of Trustees' position may be demonstrated by assuming that they agreed with the Unions that Section 77(n) is applicable to the Debtor's protection agreements. Had they done so and then worked out a further agreement suspending the protection payments, with or without the intervention of a mediator under the Railway Labor Act, a situation essentially parallel to *Nemitz* would be presented. Any such further agreement between the Trustees and the Unions would be subject to attack by individual members of the Unions just as in *Nemitz*. The decision of the Sixth Circuit in this case in its assertion that the procedure of Section 77(n) was not followed is clearly incompatible in principle not only with its own decision in *Nemitz* but also the decision of this Court therein.

As this Court's decision in *Nemitz* makes clear, both Section 77(n) and the Railway Labor Act can have no application to protection agreements imposed by the ICC. For the present case, this conclusion is strengthened by the interim nature of the orders entered at trial. This is illustrated by *Pitney, supra,* where a reorganization court approved interim arrangements of the trustees to preserve and protect a debtor's estate even though, as here, rights of employees to monetary payments were temporarily affected pending final determination of the merits in the appropriate forum.

3. Denial By The Sixth Circuit Of The Trustees' Right To Prove Irreparable Harm To Debtor Calls For The Exercise Of This Court's Powers Of Supervision.

Vacation of Orders Nos. 71 and 101 of the Reorganization Court without remand cut off any evidentiary hearing on the major issue of irreparable harm. One of the grounds of reversal below was the alleged absence of an evidentiary basis to support the trial court's exercise of its equitable powers. The Sixth Circuit stated:

> "We do not believe that the District Court could properly wield its equitable powers . . . without having heard testimony on such problems bearing on equity as what represented the status quo and what the effect of suspension of the agreements would be." (App. p. A3).

Yet the Sixth Circuit then denied the Trustees their "day in court." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 156 (1963). Instead, it assumed their inability to prove their case as a matter of law by failing to remand for further hearing. This constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

At the hearing before the Reorganization Court the Trustees were prepared, and did offer, to present direct proof of the irreparable harm which would be caused the Debtor by loss of the protection payments pending resolution of whether they should be made.[7] Having before it in the

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[7] The fact that the Trustees intended to adduce proof on irreparable harm is clear from the record. Court of Appeals App. pp. 32 and 67. Very early in the hearing on April 16, 1973, counsel for the Trustees said:

> "If the Court please, on the matter of evidence, we did have some points we thought could not go in by documents, and perhaps 10 minutes of questions of Mr. Tyler at some point—it would greatly shorten our presentation if we had stipulations to the documents of course."

(Footnote continued on following page)

reorganization proceedings a full-length portrait of Debtor's financial problems, the Reorganization Court determined that testimony by the Trustees was not needed. This precluded the Trustees from testifying as to the grave effect loss of these payments would have on the reorganization of the Debtor. This is not a case where a litigant, having full opportunity to present his case, has failed to do so. It is a case where a ruling by the trial court, later held to be incorrect, has prevented a party from presenting evidence to support his claim.

It is a fundamental principle of law that where facts are insufficiently developed in an equitable proceeding, either because the lower court failed to hear evidence relating to a material issue of fact or because the facts underlying the lower court's decision are not apparent from the record, substantial justice on appeal is best served by remanding the action to the lower court with instructions to hear evidence and make findings of fact. *Villa v. Van Schaick*, 299 U.S. 152 (1936). A failure to remand such a case for further evidentiary development denies the unsuccessful party his day in court and his right to develop fully the merits of his case. *Florida Lime & Avocado*

(Continued from previous page)

Later counsel returned to the subject of Mr. Tyler's testifying in the following colloquy:

> "Mr. Stevens: We will [sic-not] submit another brief, but I do have a few questions of Mr. Tyler that I would like to ask.
>
> The Court: What is the nature of the questions?
>
> Mr. Stevens: I think the nature of the questions, your Honor—I wanted to ask him some questions about the effect of the protection agreement and the establishment of the impounded account.
>
> The Court: Well, I think the establishment of the impounded account is a matter of record before the Court, pursuant to my order. It was ordered that it be established in the Society National Bank, which has been done, and as far as the other question, I don't think at this point any additional testimony would be required."

Growers, Inc. v. Paul, 373 U.S. 132 (1963); *Willing v. Binenstock*, 302 U.S. 272 (1937).

In *Villa v. Van Schaick, supra*, New York claimants to the liquidation assets of a surety company were preferred over Minnesota claimants by the Supreme Court of New York. The New York Court of Appeals affirmed. The Minnesota claimants appealed to this Court contending that New York claimants could not be preferred over Minnesota claimants under the Fourteenth Amendment. This Court reversed *and remanded* on the ground that the record was inadequate as to facts underlying the state court's decision. This Court stated:

> "We have frequently said that in the exercise of our appellate jurisdiction we have power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires. In determining what justice does require, we have considered changes, either in fact or law, supervening since the judgment was entered; and in such cases we have set aside the judgment and remanded the cause so that the state court might be free to act. *We think that the fundamental principle involved in such action applies as well to cases where the record before us does not adequately show the facts underlying the decision of the state court of the federal question, and opportunity should be given for their appropriate presentation either through amendment of the record or by further proof as the state court may be advised.*" [Citations omitted.] *Villa v. Van Schaick, supra* at 155-56. (Emphasis added.)

Cf. Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939).

The need for a party to have the opportunity to present his case fully, as recognized in *Van Schaick*, was specifically addressed by this Court in *Florida Lime & Avocado Growers, Inc. v. Paul, supra*. In that case, a three-judge district court denied an injunction sought by the ap-

pellant to restrain enforcement of a provision in the California Agricultural Code which had the effect of excluding some Florida grown avocados from California. The appellant had offered, but the court failed formally to admit, evidence relevant to the issue of whether enforcement of the statute was a burden on interstate commerce. On appeal, this Court affirmed on two issues, but reversed *and remanded* on the interstate commerce issue, reasoning that any final decision would effectively deny one or the other party his day in court.

> "Thus the only evidence which would seem to support an injunction on the ground of burden on interstate commerce has never been formally admitted to the record in this case. For this Court to reverse and order an injunction on the basis of that evidence would be, in effect, to admit the contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objections. To assume the admissibility of the evidence under these circumstances would be to deny the appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary. [Citations omitted.] On the other hand, to affirm the District Court would require us to make equally impermissible assumptions as to the state of the record." *Id.* at 156.

This Court has applied this accepted principle of appellate procedure in many parallel and analogous cases. For example, in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), the court of appeals reversed a lower court judgment for plaintiff and entered judgment for the defendant based upon a defense which the lower court had stricken without hearing plaintiff's evidence on that issue. This Court reversed *and remanded* stating:

"The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute. *Cf. Fountain v. Filson*, 336 U.S. 681; *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801; *Globe Liquor Co. v. San Roman*, 332 U.S. 571; *Cone v. West Virginia Paper Co.*, 330 U.S. 212." *Id.* at 533.

This principle also has been recognized and applied in each of the United States Courts of Appeal. *Sammons v. Colonial Press*, 126 F.2d 341 (1st Cir. 1942); *Tobin v. Edward S. Wagner Co.*, 187 F.2d 977 (2nd Cir. 1951); *City Line Center, Inc. v. Loew's Inc.*, 178 F.2d 267 (3rd Cir. 1949); *United States v. Wimbish*, 154 F.2d 773 (4th Cir. 1946); *Cockburn v. O'Meara*, 141 F.2d 779 (5th Cir. 1944); *Tower Realty Co. v. City of East Detroit*, 185 F.2d 590 (6th Cir. 1950); *Walling v. Goldblatt Bros.*, 128 F.2d 778 (7th Cir. 1942), *cert. denied*, 318 U.S. 757 (1942); *Equitable Life Assur. Soc. v. Mercantile Com. B & T Co.*, 143 F.2d 397 (8th Cir. 1944); *Century Inv. Corp. v. United States*, 250 F.2d 139 (9th Cir. 1957), *cert. denied sub nom., Ester v. United States*, 356 U.S. 950 (1958); *United States v. Martin*, 267 F.2d 764 (10th Cir. 1959); *United States v. Morow*, 182 F.2d 986 (D.C. Cir. 1950).

Finally, the departure by the Sixth Circuit from the accepted norms of judicial procedure is highlighted by the cases which it cited in support of its reversal. Referring to *North American Coal Corp. v. U.M.W.A.*, 497 F.2d 459 (6th Cir. 1974) and *Detroit News Pub. Ass'n v. Detroit Typographical Union*, 471 F.2d 872 (6th Cir. 1972), the Sixth Circuit noted that it had previously "reversed orders entered under the court's equitable powers for fail-

ure to take evidence and make findings of fact on irreparable injury" (App. pp. A3-4).

In *North American Coal Corp.*, the Sixth Circuit reversed an order granting a preliminary injunction, but in fact *remanded* for a rehearing to obtain evidence as to the competing equities of the parties. In *Detroit News*, the evidence had been fully developed at trial and no remand was required.

If, as the Sixth Circuit held, the Reorganization Court erred by not taking testimony from either party, the usual and normal remedy would be to remand with instructions to hear evidence on irreparable harm. Both parties would then have an opportunity to present the proof which each said it had available at the original hearing. By reversing and vacating the orders of the Reorganization Court, the Sixth Circuit has in effect determined the case on its merits without having before it any evidence to support a final determination and has denied the Trustees their day in court to present their case. This grievous departure from the normal course of judicial procedure and the fundamental principle expressed in *Paul* and *Van Schaick*, *supra*, requires that this Court exercise its powers of supervision so as to permit the Trustees an opportunity to prove irreparable harm to the Debtor.

CONCLUSION

Although the issue of suspension of the protection agreements has not been finally resolved, the Sixth Circuit has *finally determined* that there should be no interim impoundment of the payments under those agreements. Its judgment would require disbursal of the funds on hand and substantial erosion of the Debtor's assets should the agreements ultimately be suspended during reorganization. If railroads in reorganization under Section 77 of the Bankruptcy Act are to be restored to viability, orders of a reorganization court protecting their assets, pending adjudication in another forum, must be upheld.

The petition for certiorari should be granted and the supervisory powers of the Reorganization Court recognized and restored.

Respectfully submitted.

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